

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF ILLINOIS
3 WESTERN DIVISION

3 LDGP, LLC, et al.,) Docket No. 15 C 50148
4))
5) Rockford, Illinois
6) Tuesday, August 2, 2016
7) 10:15 o'clock a.m.
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9 CYNOSURE, INC.,))
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1 (The following is from a tape-recording of proceedings:)

2 THE CLERK: Calling 15 CV 50148, LDGP v. Cynosure, Inc.

3 THE COURT: All right. Let's get appearances.

4 MR. BRUCE: Devon, D-e-v-o-n, Bruce on behalf of the
5 plaintiffs, your Honor.

6 MR. GRAVINO: Marc Gravino on behalf of the plaintiffs,
7 your Honor.

8 MR. SAMORE: Good morning, your Honor. Eric Samore on
9 behalf of defendant Cynosure.

10 MR. BALFOUR: Good morning, your Honor. Ronald Balfour
11 for Cynosure.

12 THE COURT: Good morning.

13 All right. I've got multiple motions in front of me.
14 Essentially they're just the cross-motions. It's all over the
15 same types of issues. I've read the -- I've read this. I've
16 read the pleadings.

17 MR. SAMORE: Your Honor, may I make a preliminary
18 request? And that is I'd like to supplement the record with the
19 product brochure that was given to customers in 2013, which was
20 the approximate time that the plaintiffs made their purchases.
21 And I've provided them with a copy of this with the tabs earlier
22 this morning.

23 THE COURT: Have you seen a copy?

24 MR. BRUCE: Yeah, he e-mailed me yesterday. I couldn't
25 download it. He showed me this morning. Mr. Samore. I don't

1 have a copy of them.

2 I guess as a general proposition -- I'm easy going,
3 Judge. If he wants to refer to it -- he's representing to the
4 court that was given to all of the plaintiffs. I don't know
5 that that's the case. We haven't -- I mean, just -- but no, I
6 don't have a problem with it, and things come up. So, that's
7 fine, Judge.

8 THE COURT: Sure. If Mr. Ferguson is allowed to handle
9 it.

10 MR. SAMORE: Your Honor, I'm not representing that it
11 was handed to all of the plaintiffs. What I'm saying is that
12 that was the product brochure that was the first version in 2013
13 that it was the custom and practice to provide to customers.
14 The exact version that was given to these plaintiffs --

15 THE COURT: And so, let's get our nomenclature clear.

16 MR. SAMORE: Yes.

17 THE COURT: When you're saying customers, you're saying
18 purchasers of the product.

19 MR. SAMORE: Purchasers of the product, right. We
20 don't have any testimony from any customers, including the
21 plaintiffs, with respect to exactly what was provided before the
22 sale, which is one of the reasons why the record is so garbled
23 in this matter. But what we do know is that the --

24 THE COURT: Can we back up to what I was talking about?

25 MR. SAMORE: Oh, absolutely. Sorry.

1 THE COURT: Just for fun.

2 MR. SAMORE: Sure.

3 THE COURT: All right. If you want this to be part of
4 the record, you're going to have to file it on CM/ECF. Okay?
5 And I have it. They've got a copy. Plaintiff has a copy. And
6 I'll take a look at it.

7 MR. SAMORE: Okay. Thank you. Thank you.

8 THE COURT: But if you want it going in the record and
9 you want it to be part of the record, make sure you take it down
10 to the second floor and file it on CM/ECF --

11 MR. SAMORE: Sure.

12 THE COURT: -- with the Clerk's Office.

13 I also, because I'm a glutton for punishment, went
14 through the Manual of Complex Litigation again, just because
15 it's so much fun. The -- let me put this all in context.

16 When we initially set the schedule for the case, I did
17 it in phases. Some people might say bifurcated. So, we were
18 focused on the class cert issue, not the merits issue, with the
19 idea being that it would simplify discovery. And I'm pretty
20 confident I said at that time that oftentimes when you try to
21 simplify discovery by bifurcating, it comes back and bites you,
22 and it doesn't really simplify things.

23 And so, the Manual for Complex Litigation is very
24 helpful in that regard, and it says you should try to simplify
25 unless it causes more problems. This appears it might be one of

1 those cases that maybe we just opened a whole issue up for full
2 blown merits discovery, discovery on everything, and we can
3 proceed, and then once everything's set for class cert, we can
4 have a class cert motion. I can brief that while we continue
5 on.

6 So, that's my opening on what I've got. So, I've read
7 the materials. I got a sense of where things are going.
8 Defendant filed the initial motion. So, first in the door. So,
9 tell me -- I've got lots of questions.

10 MR. SAMORE: Sure.

11 THE COURT: But tell me what you want to tell me.

12 MR. SAMORE: Sure.

13 THE COURT: And then I'll hear from Mr. Gravino, and
14 then you tell me again, and we'll keep talking.

15 MR. SAMORE: Yes, your Honor. Thank you very much.

16 Just to -- I'd like to comment upon the brochure that
17 was actually provided to customers in 2013. Because if you read
18 the material that was actually provided to customers, it clearly
19 represents on Pages 438, Bates stamp 438 and 440, better
20 clearance with fewer treatments.

21 THE COURT: Okay.

22 MR. SAMORE: Clearance is a percentage. Better
23 clearance with fewer treatments. It's not promising perfect,
24 invisible to the naked eye. On Page 440, better results.
25 Again, not promising it will be invisible to the naked eye. The

1 product brochure that was handed to customers also included
2 photographs of the actual tattoos showing that they were -- some
3 were partially removed, but not completely removed.

4 The photographs that plaintiff has been basing his
5 entire brief on are post-sale documents, and those -- we
6 question and it will be a subject of discovery whether those
7 were seen by any of the plaintiffs because they were not part of
8 the product brochure, and those photographs were available for
9 doctors to use --

10 THE COURT: Which photographs?

11 MR. SAMORE: -- if they wanted to market to their
12 customers, to their patients.

13 THE COURT: Which photographs? The ones that I'm
14 looking at now --

15 MR. SAMORE: No, no, no, no, no.

16 THE COURT: -- that you just handed me or the other
17 ones?

18 MR. SAMORE: The photographs that the plaintiff has --

19 THE COURT: The butterfly. Butterflies on models.

20 MR. SAMORE: The butterfly.

21 THE COURT: Okay.

22 MR. SAMORE: And so, at a minimum, I mean, what I can
23 safely say on this record is that we believe that the evidence
24 will show that prior to the sale the defendant expressly
25 represented that the product would provide better clearances

1 with fewer treatments. It's not promising a hundred percent.
2 And that's significant.

3 In addition, the understanding of the plaintiffs is
4 very important for all of the issues in the case, issues
5 pertaining to reliance, whether they were deceived by those --
6 even if they saw those photographs before the sale, whether they
7 were deceived by them, whether they relied on them, whether
8 there was a proximate cause of their alleged injury.

9 THE COURT: If you saw the photographs, how would you
10 not rely upon them?

11 MR. SAMORE: Well, if they -- well, because they have
12 to be viewed in context of all of the representations that were
13 made, and in context it was represented that the product would
14 not remove -- necessarily remove 100 percent of each and every
15 tattoo.

16 I think that if you saw some photographs showing that
17 there was complete removal and some that were not, you would
18 conclude that sometimes -- you might conclude that sometimes
19 there was -- it was invisible, and sometimes it was not.

20 In addition, the visibility depends upon the distance.
21 I mean, what is invisible at six feet is not maybe visible at
22 three feet or two feet. And the -- I mean, I'll go right down
23 the various things, but --

24 THE COURT: I don't want to head down too far on this
25 rabbit hole, but what's the purpose of this picture with a

1 totally clear back?

2 MR. SAMORE: That's to draw attention to the product.

3 THE COURT: Where is the product? Unless it's a
4 massage parlor and we're in Vegas, I'm not sure what the product
5 is here.

6 (Laughter.)

7 THE COURT: Okay. It's going to draw attention.

8 MR. SAMORE: Right.

9 THE COURT: Okay.

10 MR. SAMORE: All right. Now, I can go through -- I
11 don't know if you want me to go through each of the requests in
12 broad categories.

13 THE COURT: Tell me whatever you -- look. I've got my
14 own views. I've thought about it.

15 MR. SAMORE: Okay.

16 THE COURT: I've got some ideas, but --

17 MR. SAMORE: Okay.

18 THE COURT: -- you've briefed it.

19 MR. SAMORE: Okay.

20 THE COURT: You know I've read the briefs.

21 MR. SAMORE: All right.

22 THE COURT: If there's something you want to highlight,
23 if there's something new that came up, like, you know, you want
24 to show this, you tell me what you want to tell me, and I'll
25 hear what they have to say.

1 MR. SAMORE: Right. Okay. Thank you, your Honor.

2 Okay. Now, with respect to the discovery pertaining to
3 the number of procedures performed and revenues, that evidence
4 is relevant to the PicoSure at the time of purchase. One way to
5 value an asset is by the revenue that can be generated by the
6 asset.

7 With respect to our motion concerning customer
8 complaints and satisfaction, those documents are clearly
9 relevant to the key issue. Did the product perform as
10 represented. Okay. Did they achieve better clearances with
11 fewer treatments.

12 In addition, I mean, without those -- I mean, what
13 they're saying to us is the product didn't work as represented,
14 but they're denying us the evidence that would show whether the
15 product worked or not. The evidence of the patients'
16 complaints, their satisfactions, their comments is directly
17 relevant to the key issue in the case.

18 Request number 25 concerns documents pertaining to the
19 plaintiffs' complaints or compliments.

20 In addition, interrogatory number 15 asks for all
21 individuals who declined to use the product because of the
22 alleged deficiency.

23 Another category is the use of other tattoo removal
24 products. This product was geared to doctors or medical
25 professionals who were working under their supervision. That's

1 required by law to be operated either by a doctor or under their
2 supervision.

3 Their prior experience with tattoo removal products is
4 relevant to their understanding, and their understanding is
5 relevant to the issue of whether they were actually deceived,
6 whether they relied, and whether there was a proximate cause of
7 their damages.

8 Requests 27 through 29 requests a consent form and
9 other informational documents, and this is very important to me.
10 I think that what we'll see there is that the doctors disclosed
11 to their patients. They may have disclosed to their patients
12 what type of results to expect from the -- by the PicoSure
13 product, which would indicate -- which would be strong evidence
14 with respect to what their understanding was with respect to its
15 efficacy. Their disclosures to their own patients is directly
16 relevant to the key issues in the case.

17 We also ask --

18 THE COURT: The key issues in the case or as to class
19 cert?

20 MR. SAMORE: I think it's directly --

21 THE COURT: Because that's why I tried to frame the
22 issue. We were here for class cert.

23 MR. SAMORE: That's a great -- and I honestly believe
24 it is relevant to both. It's relevant to the certification
25 because for multiple reasons. One is if discovery reveals, as

1 we believe it will, that there's a variance of understanding
2 between different purchasers, before they make this \$300,000
3 purchase, they're going to do some research on it. They're very
4 likely going to be reviewing authoritative articles. They're
5 going to have their prior experience with other tattoo removal
6 products. All that evidence may vary from plaintiff to
7 plaintiff, which may render it unsuitable for class
8 certification. The claims may not be typical. They may not be
9 adequate. There may be a predominance of individualized input.

10 It's also relevant to the merits, whether these claims
11 even have a cause of action. Again, plaintiffs' advertisements,
12 how they advertise, is directly relevant to what their
13 understanding was. They basically have blocked us from seeing
14 any of their advertisements prior to their purchase of the
15 PicoSure. But what we know is that -- from our own independent
16 research is that they understood tattoo removal not to mean
17 100 percent invisible to the naked eye.

18 THE COURT: Let me pause you right there because I did
19 not follow that. So, you did your own research. You've gone
20 online. You've found some things. And you said that the
21 exhibits supported the position that they knew it wouldn't
22 remove, as --

23 MR. SAMORE: Yes.

24 THE COURT: -- in eliminate, the tattoos. And then one
25 is Exhibit C on docket entry 71. It's the same exhibit -- I

1 want to say they're D, E, and F. Hold on one second here. Yes.
2 D, E, and F in docket entry 69. I'm not seeing it.

3 MR. BALFOUR: I'm sorry. In which part? Okay.

4 THE COURT: It is docket entry 71.

5 MR. BALFOUR: Right.

6 THE COURT: And it's Exhibit C.

7 MR. BALFOUR: Right. It's the same --

8 MR. SAMORE: Oh, exhibit.

9 THE COURT: It's the same document that's in 69, and
10 then there's two others.

11 MR. BALFOUR: But Exhibit C or D. Sorry.

12 THE COURT: C, as in cat.

13 MR. SAMORE: Exhibit C what we have is an article on
14 laser tattoo removal.

15 THE COURT: Right.

16 MR. SAMORE: Okay. And Exhibit D is --

17 THE COURT: No. Okay. Let's do this really simply.
18 Pick up Exhibit 71.

19 MR. SAMORE: Okay. We have Exhibit 71.

20 THE COURT: Okay. There's only --

21 MR. SAMORE: Oh, 71.

22 THE COURT: It only goes up to Exhibit C, as in cat.

23 MR. SAMORE: Oh. What 71 is -- let's see. I've got --
24 our motion was document 69.

25 THE COURT: Right.

1 MR. SAMORE: Okay. And then where's 71? 71. Is that
2 the plaintiffs' filing or -- I'm sorry.

3 THE COURT: Nope. Signed by you.

4 MR. SAMORE: Okay. It's Exhibit 71.

5 THE COURT: Yes. All right. Let's try to make it
6 easier. The same documents are in Exhibit 69.

7 MR. SAMORE: Okay. Oh, wait a second. I think I see.
8 71.

9 THE COURT: Exhibit D. D, as in dog, in Exhibit --

10 MR. BALFOUR: D, as in dog, yes.

11 MR. SAMORE: Okay. We have that. Yes. Thank you.

12 THE COURT: (Continuing) -- in filing 69 is the same as
13 Exhibit C, as in cat, in 71, and Exhibit E is attached to that.
14 These are all documents that the defendant was able to obtain, I
15 assume online, and the point that the defendant was trying to
16 make or I was told in the pleadings or in the briefs, that these
17 exhibits showed that the plaintiff understood that removal meant
18 not eliminate, but to lessen.

19 MR. BALFOUR: Right.

20 THE COURT: That's the pitch that was made. I looked
21 at the exhibits, and I'm not seeing that at all.

22 MR. BALFOUR: So, your Honor, these documents are from
23 before this plaintiff bought the PicoSure machine.

24 THE COURT: Okay.

25 MR. BALFOUR: They are talking about tattoo removal.

1 They specifically say our RevLite lasers on the first page
2 remove tattoos. Now, that is the same RevLite laser that the
3 studies show is less effective at removing tattoos than the
4 PicoSure, the point being that the plaintiffs have represented
5 to their own customers that tattoo removal does not mean what
6 counsel now says they think it means.

7 THE COURT: You lost me.

8 MR. BALFOUR: Sorry. So, they're talking about tattoo
9 removal, right?

10 THE COURT: All right. We're looking at Exhibit D.
11 Got it? D, as in dog. Got it. All right. It's in front of
12 me.

13 MR. BALFOUR: And under the tattoo removal heading, it
14 says, quote, our RevLite lasers safely penetrate the skin and
15 target get each tattoo ink color with specific wavelengths,
16 causing tattoos to gradually fade during the course of 5 to 15
17 treatments. Now, that, based on the heading, is what plaintiffs
18 describe as tattoo removal to their own customers.

19 THE COURT: Are we looking at the same document?

20 MR. SAMORE: I think that --

21 THE COURT: D, as in dog.

22 MR. BALFOUR: Yes, that's the same -- I'm looking at --

23 THE COURT: Where is the our RevLite removals? It says
24 tattoo removals.

25 MR. SAMORE: Oh, I see.

1 THE COURT: Then there's a box that says safe and
2 effective --

3 MR. BALFOUR: Right.

4 THE COURT: -- tattoo removal.

5 MR. BALFOUR: So, four lines down from that.

6 THE COURT: Okay. Our staff is trained?

7 MR. BALFOUR: No. Right above that. The last sentence
8 of the first paragraph there.

9 THE COURT: Our RevLite.

10 MR. BALFOUR: Lite TM lasers.

11 THE COURT: Okay. Our RevLite lasers safely penetrate
12 the skin and target each tattoo ink color with specific
13 wavelengths, causing tattoos to gradually fade during the course
14 of 5 to 15 treatments. Okay?

15 MR. BALFOUR: So, according to plaintiffs, that's what
16 tattoo removal means.

17 THE COURT: Is there anything on the next page of
18 Exhibit D, as in dog?

19 MR. BALFOUR: The next page again they're talking about
20 tattoo removal on the bottom.

21 THE COURT: Right. I'm there.

22 MR. BALFOUR: The laser emits short zaps of light,
23 targets and stimulates the body's immune system to remove the
24 pigment.

25 THE COURT: Exactly.

1 MR. BALFOUR: Right. So, the point being that
2 plaintiffs' position that removal means complete elimination is
3 not the position they've taken with their own customers.

4 THE COURT: It says remove the pigment. Isn't that
5 remove?

6 MR. BALFOUR: It does not, and the studies we've
7 provided show that because our machine is three times more
8 effective than the RevLite.

9 THE COURT: Slow, slow, slow down.

10 MR. SAMORE: It's important --

11 THE COURT: My point being --

12 MR. SAMORE: Yes.

13 THE COURT: It's a really simple point is the documents
14 were provided in an attempt to show that the plaintiffs'
15 understanding of removal meant reduce, not eliminate, and I'm
16 just not seeing it in these documents. I mean, it says remove,
17 right? They use the same word. Remove.

18 MR. BALFOUR: Well, that's exactly right, but they
19 don't -- when they say that, they do not mean complete
20 elimination, unless -- counsel has pointed out repeatedly that
21 not all tattoos can be completely eliminated. That's the whole
22 point of their entire motion.

23 THE COURT: All right. How about in E, as in Edward?

24 MR. SAMORE: And, your Honor, did you see on Exhibit D
25 that it's a RevLite? RevLite is referred to in one of the

1 studies as being the precursor. It's not nearly as effective,
2 according to the medical study, as the PicoSure because the
3 wavelength of the PicoSure is much shorter.

4 THE COURT: Okay. How about E? Tell me in E where it
5 would support the proposition that plaintiffs understood remove
6 means lessened, not eliminated?

7 MR. BALFOUR: It's Page 3.

8 THE COURT: Okay. Hold on one second. Two of four,
9 three of four. Yeah. It says can lighten or remove, right?

10 MR. BALFOUR: It does say that. But counsel is saying
11 that tattoos cannot be removed, which is contrary to what this
12 says. Basically I think plaintiffs are taking a position that
13 doesn't jive with what they're telling their customers.

14 THE COURT: I'm not seeing it. Okay. How about E --
15 or F. Show me in F.

16 MR. BALFOUR: F is the best one.

17 THE COURT: Tell me in F.

18 MR. BALFOUR: So, here's F. F is great because it
19 specifically says on Page -- which --

20 THE COURT: It says on Page 2 we guarantee tattoo
21 removal.

22 MR. BALFOUR: Right. So, the third page of this
23 towards the bottom, I have had 15 to 20 treatments. Do you see
24 that in bold?

25 THE COURT: Which part of it? Page 3?

1 MR. BALFOUR: Yeah.

2 THE COURT: Three of eight?

3 MR. BALFOUR: Yes. Or three of seven.

4 THE COURT: At the top it will say Page --

5 MR. BALFOUR: Right. 4 of 8 at the top.

6 THE COURT: 4 of 8. Okay. I'm there.

7 MR. BALFOUR: Towards the bottom. I've had 15 to 20
8 treatments on my tattoo, and it's still there?

9 THE COURT: Yes, I see that.

10 MR. BALFOUR: Unlike traditional lasers, PicoSure is
11 great at removing previously treated tattoos. That's our
12 product they're talking about. That's the product they're
13 telling the court cannot remove tattoos, and they're telling
14 their customers the exact opposite. In fact, I have a printout
15 from yesterday that their website still says that, despite what
16 they're saying in court now.

17 THE COURT: All right. So, now I understand. What
18 you're telling me here is something different that's in the
19 brief.

20 MR. BALFOUR: My apologies, your Honor.

21 THE COURT: Or maybe my interpretation is wrong.

22 Okay. So, I paused you there. You were telling about
23 what you found online. I obviously saw what you found online
24 where they're talking about -- it says complete removal. Okay.

25 All right. Go ahead.

1 MR. SAMORE: So, their advertisements we believe are
2 relevant and should be produced because we believe that
3 plaintiffs understood the phrase tattoo removal consistent as
4 it's stated and used by the FDA consistent as it is used by
5 authoritative articles in their medical field. We also request
6 records pertaining to --

7 THE COURT: Is there any evidence that they knew about
8 these authoritative articles?

9 MR. BALFOUR: No, because they refused to provide the
10 evidence.

11 MR. SAMORE: They've (inaudible) to block us --

12 THE COURT: I'm just asking questions.

13 MR. SAMORE: One of the 30(b)(6) topics that they've
14 objected to is what research they did before making this
15 \$300,000 purchase. We believe that some people before they make
16 a \$300,000 purchase are not just relying on the salesperson's
17 representations, that especially doctors may have done their own
18 independent research of this product, and our website has
19 consistently cited all of the authoritative peer-reviewed
20 articles praising the PicoSure product as a significant
21 improvement over any prior similar product.

22 THE COURT: So that you look like this woman, with
23 nothing on her back. Okay.

24 MR. SAMORE: The tattoo removal training is important
25 because if they were not obtaining the good results that were

1 reported in the medical literature by -- you know, including
2 doctors at Harvard and Massachusetts General, who was one of the
3 authors of a couple of the peer-reviewed pieces. If they were
4 not obtaining better clearances with fewer treatments, then
5 maybe they weren't using the product properly. It's a
6 complicated product. There has to be settings, training. The
7 product has to be used by a doctor under a doctor's supervision
8 by a medical professional that has been authorized by the state,
9 and that varies from state to state.

10 Unless you've got further questions, that's pretty much
11 it. I reserve the right to comment after hearing plaintiffs'
12 argument.

13 THE COURT: Everybody will have -- you don't have to
14 reserve anything here. We'll talk.

15 Is there any insurance coverage currently on this? Is
16 there a DEC action pending?

17 MR. SAMORE: There is -- I'm not involved in the
18 insurance coverage, but there is a defense and a reservation of
19 rights. I don't believe there's an insurance declaration
20 coverage, any coverage litigation.

21 THE COURT: I know it's kind of early to be talking
22 about this, but are we going to -- does anybody anticipate
23 bringing in third-parties in this case? And if so, would there
24 be like insurance coverage for an advertising policy?

25 MR. SAMORE: I don't believe that there's any

1 third-parties that are contemplated to be brought into this
2 case. We do not -- at this point in time, we believe that --
3 you know, that the product worked as represented.

4 In addition, we should note that with respect to --
5 there's a pending motion for judgment on the pleadings that
6 would eliminate several of the counts that would narrow the
7 issues further if that's granted.

8 THE COURT: And that's pending before the district
9 judge --

10 MR. SAMORE: Yes.

11 THE COURT: -- once it gets fully briefed.

12 MR. SAMORE: Right.

13 THE COURT: Okay. Because here's why I ask that. You
14 know, I see the photos, you know, with the before and after,
15 which is it disputed that it was photo-shopped? Is there any
16 dispute about that?

17 MR. SAMORE: With respect to one of them, there's no
18 dispute. With respect to two, I first saw those in conjunction
19 with this, but there's been no -- I'd have to verify with the
20 company. What is disputed is whether those were seen by
21 customers before the purchase because those were marketing
22 materials that doctors could use after they made their purchase
23 to market to their customer.

24 THE COURT: So, the people who have the tattoos get
25 shown this of a before and after that's been photo-shopped,

1 which is -- look. I'm a simple guy. So, I'm thinking, well,
2 that seems like an advertising pitch to me with a photo-shop,
3 and that's really a bad fact for somebody. You know, it doesn't
4 take a lot to figure out.

5 MR. SAMORE: Right, right.

6 THE COURT: That's a bad fact for some entity in this
7 process that sold the product.

8 MR. SAMORE: And it has been changed. The photos
9 clearly state that they're a model, so that there's no
10 misunderstanding. As soon as that photograph was brought, you
11 know, to our -- I learned about this, they changed the one, and
12 I believe all of them have changed. If you go to the website,
13 it's been changed. And so, your point is well --

14 THE COURT: All right. Okay. All right. Anything
15 else?

16 MR. SAMORE: No. Thank you, your Honor.

17 THE COURT: Okay. All right.

18 MR. BRUCE: Judge, Devon Bruce on behalf of the
19 plaintiff. Thank you. Just a couple preliminary matters. I
20 don't want to run afoul of your order, Judge. I don't see
21 anybody else in the courtroom. Cynosure's counsel hasn't made
22 an issue of it, but they were very particular about getting a
23 confidentiality, and I'm going to talk, refer to, and show the
24 court, and I just don't want to -- I didn't want to run afoul of
25 your order.

1 THE COURT: That's fine. Not a problem.

2 MR. BRUCE: Okay. I think you made a prefatory
3 comment, your Honor, about how you had ordered this discovery to
4 proceed, and that is part and parcel of what brings us here
5 today, which is you had phased it. We embrace that and agree
6 with it. And we're here today on class action discovery. I'm
7 going to let Mr. Gravino address that more towards the end.

8 But you make an excellent point, Judge. We're not --
9 as I understood your order and what I've been conducting
10 ourselves is we're not at the merits phase discovery. I have
11 that same book you do, and that's my bible in terms of this
12 discovery, as well.

13 In any event, so let me just respond to some of the
14 things that Mr. Samore said. First of all, I don't mind him
15 giving us these documents this morning. I don't have a copy of
16 what he gave to the court, but we'll get one from him. But,
17 Judge, that is not in their briefs. I mean, I just -- I think
18 it's important to kind of put this whole case and what we're
19 saying and what they're saying in context for looking at this
20 discovery and especially looking at it for the class action
21 discovery.

22 What we're saying in this case, and it is clearly set
23 forth in our pleadings, the first thing we're saying is they
24 advertised that this product would remove tattoos. And I think
25 it's very important. They want to -- at least in the briefs,

1 not so much today, they want to draw the court into this
2 semantical argument about what does that mean and the
3 interpretation and all of that, Judge.

4 I attached to our amended complaint and the original
5 complaint -- and I want to make it very clear. We're not just
6 using the word remove as a basis of our argument. We're saying
7 that they advertised that it would remove, using that verbiage,
8 and we also attached this woman's before and after where they
9 used the word remove, and that's very important in our argument.
10 I'm not just relying on the word remove. I'm relying on the
11 word remove in the context that they -- and this isn't after
12 lawyers and lawsuits and what Devon Bruce decides to use. This
13 is what their marketing people did.

14 Judge, and just as an aside, this is the first time I'm
15 hearing all of this argument about, you know, we didn't use that
16 to sell the product, and, well, we don't know if it's
17 photo-shopped. Judge, this came from the plaintiffs. Okay?
18 He's getting way off the record here. I attached this to the
19 complaint. They admitted that. They used these products to
20 advertise the sale to the plaintiffs. Period, full stop, end of
21 story. These aren't my plaintiffs' documents. All these
22 PicoSure documents with the picture -- and not just one.
23 There's replete. There's woman after woman where it says before
24 and after. It's PicoSure's documents, and they gave them to our
25 clients to get them to buy this product. I mean, I'm hearing

1 this for the first time forever where they're saying, well, we
2 don't know if they relied on it, and that wasn't our intent, and
3 that sounds like what Mr. Samore is saying.

4 THE COURT: Can I pause you right there, Mr. Bruce?

5 MR. BRUCE: Yes.

6 THE COURT: That's the allegation in the complaint --

7 MR. BRUCE: Yes.

8 THE COURT: -- the amended complaint, which is taken as
9 true for purposes of class cert.

10 MR. BRUCE: Paragraph 13, your Honor, they admit it.

11 THE COURT: Right. I just pulled up the document.

12 MR. BRUCE: And I think I cited it in my brief. I
13 think it was Page 13. They've admitted that they advertised
14 that this machine would remove tattoos. They have further
15 admitted -- you know, I can answer the question that you asked
16 to Mr. Samore much more readily than he did. Mr. Holevas and I
17 were arguing, if you recall, about who's going to take that
18 first woman's deposition, and I asked them in the answers to
19 interrogatories, you know, name, address, all that stuff, and
20 they specifically and emphatically said that that was
21 photo-shopped on there.

22 Now, Judge, we -- you know, the only thing that we
23 don't know -- and I think that Mr. Samore said two of these
24 they're acknowledging. All of these are, you know, different
25 women, but they all have the before and after, and they're all

1 PicoSure, and they all use the word remove, and they're all used
2 to advertise this product. This is a bunch of malarkey, this
3 idea that, oh, we didn't use it to get the purchasers to buy
4 this product. And I think that's important.

5 And also they want to go down this road of, well, what
6 did the plaintiff purchasers understand. Judge, they chose to
7 advertise this, and it's all over the discovery in this case.
8 New technology. Groundbreaking technology. Brand new PicoSure
9 technology, whatever that means. It's a made up word that they
10 use. But they're using this to say look, we got this brand new
11 product. Don't buy the \$50,000 one that lightens. We want you
12 to buy the 300,000, 275,000, and here's what it does. And
13 that's where their -- that's where their problem. I didn't see
14 in any of Mr. Samore's response -- I made a big deal about this
15 in the complaint and in each of our motions. They have no
16 response to this. They have no response that brochure after
17 brochure that they gave to the plaintiff purchasers, that it's
18 before and after, and it's photo-shopped. They have no response
19 for that. Absolutely no response.

20 And the reason why, Judge, is it's consistent with the
21 formal representation they made to the FDA. Formal
22 representation. And we've pointed -- I didn't know about this
23 area of law, but if you're a company and you're applying for FDA
24 approval and you misrepresent something, that's subject to
25 criminal sanctions. I put a footnote in there. I learned this.

1 But they represented the truth, which is it doesn't remove the
2 tattoos. Okay?

3 So, the point of the whole allegation in this complaint
4 is this, Judge. We're saying they advertised that it would
5 remove tattoos using that photograph. They have now admitted in
6 answers to interrogatories and in answer to paragraph 13 of the
7 complaint they did advertise it that way. So, that's now not at
8 issue.

9 The second thing is we're saying that it doesn't remove
10 tattoos. And the fact that they're saying it's photo-shopped is
11 absolutely an admission. Judge, as you point out, if it truly
12 worked as represented, why did they take model after model after
13 model and photo-shop it. If it works, then why didn't they just
14 use their machine. It's that simple. I mean, I think a jury's
15 going to get that in about a nanosecond.

16 THE COURT: It looks like they kind of did with this
17 document.

18 MR. BRUCE: Yes. Absolutely. The very document that
19 Mr. Samore is providing to the court as further, you know,
20 proof. I mean -- so, I mean, Judge, and plus I'm relying upon
21 their representation. I mean, I would like to know from leaving
22 here today, you know, from Mr. Samore, are they saying that this
23 removes or not. Because I know what they told the FDA, it
24 doesn't, and I know that it doesn't do that based upon their own
25 advertising and what they've said. So, at any rate -- so, I

1 guess that's my response to some of these issues.

2 So, then what they want to do, Judge, and you can read
3 my -- I don't like to -- I'm not one to like recite my brief and
4 just -- you can read what we've written, as well. But each one
5 of these -- it's a very fact-based argument, right? If you
6 accept as true that they said the car would go a hundred miles
7 an hour and they advertised it that way, which we've proven, and
8 the car doesn't go a hundred miles an hour, all of these facts
9 about whether the purchaser of the car was satisfied or whether
10 or not they knew how to drive in an Indy 500 or just they were a
11 16-year old kid first learning to drive, the car doesn't go a
12 hundred miles an hour. Period. Full stop, end of story. So,
13 why --

14 THE COURT: Why wouldn't it go to damages?

15 MR. BRUCE: I'm sorry?

16 THE COURT: Why wouldn't it go to damages?

17 Hypothetically. Hypothetically. Various plaintiffs, meaning
18 spas, surgical places, removal places, dermatologists, say
19 they've got a folder, manila folder, with the compliments. I
20 assume it's going to be on a hard drive now in an electronic
21 folder, and all the ultimate customers who went in for a tattoo
22 removal, and there's five letters in there saying thank you,
23 thank you, thank you. The tattoo is gone. No one can see it.
24 My kids are happy. My employer can't see it. I'm happy. I was
25 drunk and stupid at the time. That would seem like it would go

1 to damages.

2 MR. BRUCE: Can I address that?

3 THE COURT: That's why I'm asking the question.

4 MR. BRUCE: Yes. So, first of all, that's falling --
5 and I'm being respectful, your Honor. That's the trap that they
6 want you to fall in is let's start getting into all of these
7 extraneous facts that have nothing to do with it. Whether or
8 not some --

9 THE COURT: Nothing -- when you say it, what's it?

10 MR. BRUCE: Yeah. So, whether or not a customer or
11 customers -- I mean, I would like to take each one of these
12 facts to the extent that you have the time to tee some of these
13 up. Let's give them the best case scenario and see why it
14 matters in the allegations I've made in this case, right? It's
15 a breach of contract case. All we're saying is they advertised
16 that it would do this, and they now have acknowledged --

17 THE COURT: But it's more than a breach of contract
18 case. There's a lot of claims, including the Texas Consumer
19 Fraud Act, which, boy, you don't want to be stuck with that
20 thing. That's the worst thing for defendants on the planet.

21 MR. BRUCE: So, to get to your point here, your
22 specific point about damages, Judge, I'm always over here -- and
23 I told Mr. Gravino. I'm always over here on the left side for
24 the plaintiff. I've never done the otherwise. And having done
25 this quite a few years now, Judge, every once in a while we get

1 the playbook, which is they don't have a real response, but what
2 the defendants do is they contort, confuse, and kind of reallege
3 my complaint.

4 And to this point here, first they started to say,
5 well, he's saying rescission. Then he's saying no, no, no.
6 He's saying restitution. No, no, no. He's saying -- and in the
7 reply brief it was no, no, no. We need the revenue damages for
8 consequential damages. Right? They've made every claim under
9 the sun.

10 If you read the complaint and my brief as you have, we
11 are making a very simple UCC claim. It is the claim under
12 sections -- I think it's two dash -- I don't have them all
13 memorized, Judge. 2-714 subsection --

14 THE COURT: But the complaint has more than just a UCC.

15 MR. BRUCE: I'm sorry?

16 THE COURT: The complaint has much more than just a UCC
17 count.

18 MR. BRUCE: So, well --

19 MR. SAMORE: Misrepresentation, fraud, consumer fraud.

20 MR. BRUCE: Well, Judge, I cited --

21 MR. SAMORE: (Inaudible) fraud.

22 THE COURT: Hold on. You'll get a chance to talk.

23 MR. BRUCE: Well, first of all, we get to frame our
24 damages the way we want, and the way we frame them -- I even
25 pointed this out in a brief. There's good case law, and I cited

1 a case to you about in all of those different areas and
2 theories, the UCC says I get to use the breach of contract
3 damages as the damages that I can seek, and that's what we've
4 sought here.

5 And so, the point there is, Judge, to go to your point
6 about, you know, why is that not important on damages, they want
7 to get into these revenues so badly, and there's not a single
8 case that they cite in their opening brief or in their reply
9 brief -- because I whacked them pretty hard in our response
10 brief saying that the revenues are completely irrelevant for the
11 damages that we're seeking, and I thought they would come forth
12 with some case law if there was some out there because they cite
13 zero cases, zero cases at all that stand for the proposition
14 that with the allegations that we're making you get into
15 revenues, right? There's no case that says that.

16 So, then I looked in their reply brief, and if you look
17 at Page 13 and 14, which is their entire section in their reply
18 brief on revenues, there's not a single case cited for that
19 proposition. They don't have a case for that, Judge.

20 I'm not seeking consequential damages. If they want to
21 waive the disclaimer that they made in their form contract to
22 every one of these purchasers, which obviously benefits us in
23 terms of the commonality, but if they want to waive that and say
24 we are not going to enforce that, then we can get into revenues,
25 and we can talk about lost revenues and expected revenues and

1 get into all that. But they have a very clear disclaimer about
2 that, and we're not -- and I didn't allege that in the
3 complaint. So, I --

4 THE COURT: What kind of damages are you seeking on
5 your fraud claims and misrepresentation?

6 MR. BRUCE: Same -- three whatever it is. Yeah. And I
7 knew that was -- I mean, you're making -- they didn't make that
8 argument, but you bring up a good point, and that's why I
9 fronted it, Judge. And I'm sorry. I can find that. But I did
10 cite that in our brief, that all these different theories of
11 liability can avail themselves of that thing. I'll find the
12 passage.

13 THE COURT: All right. I mean, I rarely have a
14 plaintiff tell me that they want to limit their damages.

15 MR. BRUCE: Well, I mean, that's what I'm saying is,
16 Judge --

17 THE COURT: I'm not saying it's never happened.

18 MR. BRUCE: Yeah, but we're not making that claim,
19 Judge. I mean, they sold this thing and it doesn't work for
20 \$300,000, and we want the breach of contract damages. And see,
21 they want to confuse and say, oh, Mr. Bruce is claiming -- I'm
22 not claiming that. I'm not claiming that. I mean, I don't --
23 and they don't have a case that says that they can get into it.

24 Why is the revenue -- if you look, every time they say
25 that, they throw out these broad propositions, but they don't

1 have a case. The reason why they don't have a case is because
2 that's not the proper element of damages. I mean, it's just not
3 there.

4 So, at any rate, I wanted to comment about some of
5 these other arguments that counsel's making. I mean, so, you
6 know, all of this goes to customer satisfaction.

7 THE COURT: That was my hypothetical. Tell me why that
8 wouldn't --

9 MR. BRUCE: Why is that relevant?

10 THE COURT: Why is that not relevant to the merits, as
11 well as to class cert, to the extent you can separate those
12 cleanly.

13 MR. BRUCE: Because, Judge, I'm sure that they're -- I
14 mean, give them the best case scenario that they dig up somebody
15 that says it removed you know, my tattoo. Okay. Give them
16 that, right? Their own data that they provided to the FDA says
17 it absolutely doesn't do that. I think Marc's got data here
18 that shows 51 to 74 percent of blue and greens do not on the
19 PicoSure machine get removed, right? It doesn't remove these
20 tattoos. That is an absolute truism. It is an undisputed fact.

21 So, the fact that they can dig up somebody from my
22 clients, we go through all their patient HIPAA records, we go
23 through all the photographs of the patients, we go through all
24 the e-mails, we do this massive search, and they come up with
25 this block of people. I mean, I'm answering your question.

1 Where does that get them?

2 THE COURT: Because you're not seeking consequential
3 damages?

4 MR. BRUCE: We're not talking consequential damages.
5 The car doesn't go a hundred miles an hour, and they've admitted
6 it. So, whether or not somebody was happy with the car that
7 goes 20 miles an hour is irrelevant. That's the crux of our
8 argument, and they don't really have a response to that.

9 They want to get into all these individual issues to
10 create some issue so that class cert will be denied, and I'm
11 not -- I mean, it's just -- the individuals that declined to use
12 the product. That's the next thing that counsel talked about
13 today. Same thing. If somebody decided not to use the product
14 or they decide to use the product, you know, these third-party
15 people, that doesn't matter, Judge. I'm representing,
16 hopefully, a class of people that bought this machine that were
17 told that it would go the hundred miles an hour, and it doesn't,
18 period, and we now know that.

19 THE COURT: And those are all -- and I get where you're
20 coming from that those -- assuming it's all true, those are
21 terrible facts for the defendant. But they're still entitled to
22 defend their case, though, aren't they?

23 MR. BRUCE: But, Judge, they're not entitled -- and,
24 actually, one of their cases --

25 THE COURT: I mean, it's not a binding absolute

1 judicial admission that they can never defend against, is it?

2 MR. BRUCE: Okay. And, I mean, I'm glad you -- first
3 of all, their own case law that they cited that I pointed out to
4 the court specifically talked about how you don't create these
5 frivolous defenses, you know, because they want to go into these
6 issues, and their own case law supports my proposition.

7 But to answer your question, Judge, how are they
8 calling -- in fact, Mr. Samore just admitted on the record that
9 they've now changed all their advertisements. Now they're
10 saying it's models, and it doesn't do that. Okay. I mean,
11 which is it, right? What they told the FDA is -- I don't know
12 how that can't be a judicial -- an absolute admission. And the
13 fact --

14 THE COURT: Well, and that's my point. There's a
15 difference between an admission and a judicial admission that
16 you can be bound to. That is going to be a statement by a party
17 opponent. It's going to be all kinds of --

18 MR. BRUCE: By counsel to a federal agency. This is
19 huge, Judge.

20 THE COURT: It's all kinds of things. I get it. I get
21 it. Look. People admit to all kinds of crimes, right? Right?
22 And then say, well, no, I didn't do it.

23 MR. BRUCE: But, Judge, you are in an unenviable
24 position. You've got to balance all this, right, in terms of
25 discovery? I mean, why do we have to go through all these

1 charades? That's the point of -- that's the crux of our entire
2 motion.

3 THE COURT: And I was going to go there.

4 MR. BRUCE: Why do I have to go sit and have them ask,
5 you know, this fellow in Texas --

6 THE COURT: How do we know? Right now we don't know
7 what burden would be placed on your clients. You're telling me
8 there's a huge burden. Maybe there isn't a burden. I don't
9 have an affidavit or anything in front of me.

10 MR. BRUCE: Judge, I mean, I guess don't we have to
11 have an initial discussion before we even get to -- I mean, I do
12 think it's a burden, and we can do all that and get you an
13 affidavit, I suppose, but, I mean, at the end of the day, it's
14 got to have some semblance to the issues that are in the case,
15 right? Customer satisfaction. Give him the best case scenario.

16 THE COURT: Well, it's got to be relevant and
17 proportional. Once it gets over the low burden of relevant,
18 then I start looking at proportionality, which then you start
19 talking about burden, and that's where I start going are there
20 ways to resolve the burdens.

21 MR. BRUCE: And we're fighting tooth and nail on all
22 these areas. For example, let's take his research one, right?
23 Any one of these I think we can make an awesome argument that it
24 has nothing do with the issues as I framed them. Talk about
25 research. What did -- you know, what did whomever do in terms

1 of the research. It doesn't matter. It doesn't matter. It
2 doesn't do what they said it does, and that's what is
3 undisputed. It doesn't do that.

4 So, whether or not my client did five minutes of
5 research or 20 hours of research, where does that get them? I
6 mean, oh -- I mean, at the end of the day -- and this whole
7 argument about, you know, showing -- I mean, that gets into
8 their -- I mean, really what they're asking you to do in a most
9 succinct manner is to look at -- the reason why I handed you
10 those brochures is they're not nearly as much of lies as these
11 ones that I have that I'm using, those advertisements where it
12 shows the fading, right?

13 And so, what really the defendants are asking you to
14 do, and it's in the briefs, but they don't come out and say it
15 is, what they're saying is it's okay in this country to
16 nationally advertise and on the website -- and these were on the
17 website. Okay? It's okay to advertise bold-faced lies to say
18 it will do something and not another, but if we have other
19 advertisements that aren't nearly as bad or, heaven forbid, are
20 actually true, that it's okay that you should know about the
21 non-lies, and you should know that the lies are lies. That's
22 what they're arguing today, which is -- I mean, I can't believe
23 that they're making that argument, but that's really what
24 they're asking you to rule. They're saying, oh, look at these
25 ones because they're not nearly as much of lies and disregard

1 these because we've had to admit that they're photo-shopped, and
2 it just fundamentally doesn't do what we've asked it to do.

3 So, I mean, Judge, I mean, what is the research -- and,
4 you know, the consent. Give them the best case scenario on the
5 consent. Give them the best case scenario. Let's say we have a
6 client that says -- let's give Mr. Samore the best background
7 we can. Let's say it says something like not all tattoo removal
8 machines can remove tattoos. Best case scenario. Where does
9 that get them? That's the communication, first of all, between
10 the plaintiff purchasers --

11 THE COURT: Well, that goes to reasonable reliance. It
12 goes right to the --

13 MR. BRUCE: I don't --

14 THE COURT: -- representation claim because look. And
15 I don't know what the facts show, but maybe every one of your
16 plaintiffs saw this and none of those. That's best case
17 scenario for them. Best case scenario for you is none of your
18 plaintiffs saw this, but they saw all of those.

19 So, assuming we've got warranties and reliance and
20 negligent and intentional misrepresentation, that all goes to
21 reasonable reliance, which is why it's hard to have -- not
22 impossible, but it's hard to have fraud claims as class actions
23 depending on what the pitch was. If it's an individualized
24 pitch versus this or that, you're at different ends, right?

25 So, it would seem to me that -- again, now we're

1 getting -- you're getting into merits. What the individual
2 plaintiffs saw, were told, and understood would go to their
3 reliance and whether it was a reasonable reliance.

4 MR. BRUCE: I didn't mean to interrupt, Judge. Just so
5 we're clear, and I think I cited this. I know the motion is
6 before Judge Kapala and not you. But the case law is very
7 clear -- and I'm happy to brief that -- that express warranties,
8 even after the purchase of the product, are incorporated into
9 the product description. I mean, so that express -- that case
10 law is clear. And so, you know, that's why I was like wondering
11 why he's arguing that because that doesn't help them. If they
12 came out with this afterwards, which is not the case -- these
13 clients saw it beforehand. But even assuming his fact pattern,
14 that doesn't matter.

15 I mean, they are damned by these things. That was the
16 thrust of their advertising campaign. It was on their Internet.
17 And, you know, I just -- and all of this discussion about what
18 my clients advertised, Judge, what he didn't tell you is that
19 those advertisements, the vast majority of those, were given to
20 the purchasers by PicoSure for them to put on their websites.
21 They bought the snake oil, as Mr. Gravino keeps reminding me.
22 My clients unfortunately bought the snake oil, and then they
23 just reconveyed what PicoSure literally wrote these
24 advertisements and put them back up there on the Internet. So,
25 I mean, I'm sorry that they lied, and I'm sorry then that

1 these -- they said keep proffering our lies. But I mean,
2 that -- and again, I think that's -- again, even if you assume
3 there's some best case scenario, that's the relationship, Judge,
4 between the plaintiff purchasers and all these third-party
5 people. There's no claim here. I'm not -- as of yet, I'm not
6 representing a bunch of people that said I got treated by a
7 PicoSure, and I'm suing them because the machine doesn't work.
8 They're not here. He's not representing them. I'm not
9 representing them. I'm representing the purchasers. So, the
10 relationship is what did they tell these people, and we know
11 what they told them in the pictures. I mean, the pictures
12 are -- they just can't get away from the pictures, and that's
13 the thrust of their campaign.

14 THE COURT: They're bad facts for them, and I think
15 they know that, and if they weren't bad facts, they wouldn't
16 have changed it, and then they get into a -- you know, an
17 evidentiary issue come determination.

18 I want to hear from Mr. Gravino. Before I hear from
19 Mr. Gravino, I'm just going to throw this out. The amended
20 complaint has claims in it that include attorney's fee
21 provision. So, I think we're outside the ball park of a
22 common -- assuming plaintiff prevails or there's a settlement of
23 some kind, we're outside common fund, and we're talking about
24 attorney's fees, which is -- so, there's attorney's fees versus
25 common fund, right? In my mind they're different. They're

1 different aspects. It's not like you've got a statute that says
2 if you win, you get your attorney's fees, right? A couple
3 statutes that say that.

4 So, not that class actions never settle because they
5 almost always do, but if this is going to settle, it should
6 settle sooner rather than later so that the attorney's fee
7 provision -- or the attorney's fees don't go through the roof
8 and into the stratosphere, which would interfere with a possible
9 settlement. Just throw that out there. I don't determine
10 merits of the case unless the parties consent to me.

11 MR. BRUCE: My brief response is, Judge, at any time
12 we'd be happy to pretry the case with your Honor. I mean,
13 that --

14 THE COURT: I'm always open for a settlement
15 conference.

16 So, let me hear from Mr. Gravino. Tell me what you
17 wanted to tell me.

18 MR. GRAVINO: Your Honor, on the issue that was just on
19 the table, I think my response to that would be even if the
20 defendants are successful if you were to allow this discovery
21 and they get into some of these individualizes inquiries, from
22 all the cases that I read in the handbook on class
23 certification, what the court really looks at is sort of the
24 thrust of the claim. Has the plaintiff pleaded a claim that,
25 you know, if true, the thrust of that claim is appropriate for

1 class certification.

2 So, for example, there's a case -- and, your Honor, I
3 apologize. This is probably not in our briefs. It's Rikos v.
4 Procter & Gamble Company, Sixth Circuit Court Of Appeals. I
5 need my glasses to see the cite. 799 F.3d 497. It's a 2015
6 case. And I think the analogy is strong and apparent to our
7 case. In that case there was a probiotic nutritional supplement
8 that the plaintiffs allege didn't work. It didn't have this
9 digestive health benefit. It was expensive. People bought it.
10 They didn't get any benefit. And one of the holdings was the
11 alleged misrepresentation that the manufacturer's probiotic
12 nutritional supplement promoted digestive health was the only
13 reason to buy the supplement. People didn't buy these so they
14 had something to swallow in the morning with their morning
15 vitamin.

16 And thus on consumers' class claims against the
17 manufacturer under North Carolina's Unfair and Deceptive Trade
18 Practices Act, it was reasonable to infer classwide reliance
19 based on the nature of the manufacturer's misrepresentations in
20 its advertising such that common questions predominated over
21 individualized inquiries as required. So, what the court did
22 was it looked at whether you could have had some of these
23 individualized inquiries that may have cut against the larger
24 class and said even if --

25 THE COURT: And you did balance it, and it comes out

1 because it overwhelms the individualized. Got it. I'm with
2 you.

3 MR. GRAVINO: That's right. So, even if you let them
4 go on this fishing expedition and they come in and say, oh,
5 Judge, this plaintiff saw this, and this one saw this, I
6 think -- and we've got a 30(b)(6) notice, deposition notice,
7 Judge, that's out, and we think we're going to very readily
8 prove that some version of this machine will do this -- and I'm
9 pointing to this model with the butterfly tattoo. Some version
10 of that was conveyed to each purchaser because sort of like the
11 probiotic case, Judge, the prior machines I understand were on
12 the order of 30 to \$50,000. You know, why rationally would
13 anyone spend upwards of the cost of a beautiful home in Rockford
14 for a tattoo machine that lightens tattoos marginally better
15 than the prior unit, when you can get the prior unit for 30 to
16 \$50,000. We think the essence of that claim is pleading. The
17 only way they got the buyers over that \$300,000 hump was a
18 representation that it would do this, the butterfly.

19 THE COURT: The eliminate.

20 MR. GRAVINO: The eliminate. Eliminate in the context
21 of this picture, not eliminate in the abstract that it would do
22 this. That's how they got there.

23 So, our position is that even giving the defendants
24 their due and assuming that they can unearth a couple of people
25 who said, oh, we loved it, it was the greatest thing that ever

1 happened, as your example, or whatever, those individualized
2 complaints are not going to predominate. The predominant claim,
3 as stated in that case, is that it's reasonable to infer that
4 people bought it because of the advertisement.

5 THE COURT: Okay. And I haven't read that case. So, I
6 don't know about it. I understand where the court would be
7 coming from on that, and class certification issues are highly
8 factual dependent.

9 Let me ask you this. Why should I keep it on a
10 bifurcated track? Why shouldn't I just open this whole thing up
11 for merits discovery, send you folks on your way to get done
12 what you need to get done? Because if a plan doesn't work when
13 you set it out at the beginning and you realize it's not
14 working, why stick with it?

15 MR. GRAVINO: Judge, I think two reasons. One is
16 legal, and one is practical. Picking up on your earlier
17 comment, I think the vast majority of these cases do settle, and
18 I think they typically settle either during the pendency of a
19 motion to certify class or after a class has been certified, and
20 in the interests of justice, in the interests of moving this
21 case along, I think that if we can conclude this phased
22 discovery, as you earlier approved, I think the chances of
23 getting this case briefed and then the parties either try to
24 talk about a settlement prior to the ruling or awaiting a ruling
25 on class certification, I think it gives us a far greater chance

1 to get the case resolved expeditiously and not, you know, a year
2 or two or three from now after plenary discovery is opened up
3 and -- I'm trying to envision the breadth of their discovery
4 requests if we do that.

5 THE COURT: That's my point. I don't know how much --
6 when we spit-balled this whole idea on phased discovery, it made
7 sense that it would narrow the scope of discovery. As I'm
8 getting into more of the details on the case, I don't know if it
9 does, in fact --

10 MR. BRUCE: Judge, we could --

11 THE COURT: -- saves.

12 MR. BRUCE: Judge, I didn't mean to interrupt you.
13 Judge, we could bring our motion, which is on file. We could
14 get the evidence for that in, you know, I'm just -- Marc's going
15 to kill me, but probably four or six of their witnesses max. I
16 mean, and it's our motion and --

17 THE COURT: All right. Well, of course, they get a
18 response, and they get the opportunity to do discovery, too, on
19 their motion.

20 MR. SAMORE: That's the whole point of --

21 THE COURT: Hold on. Let me finish with the
22 plaintiffs. Anything else, Mr. Gravino?

23 MR. GRAVINO: Judge, I think the -- you know, they've
24 created a self fulfilling prophecy, I think. By doing this,
25 they're suggesting, oh, look what a mess this is, and it

1 overlaps with plenary discovery, and it facilitates the argument
2 we may as well just do plenary discovery. But --

3 THE COURT: They're not asking for it. I'm the one
4 that's raising the issue. And it's rare that a defendant says,
5 hey, let's open everything up for discovery. Because the costs
6 jump through the roof for them, too.

7 MR. GRAVINO: I understand, Judge, but my impression is
8 that in class certification defendants do what the defendants
9 are doing, and that is they forage through every avenue to try
10 to show that all these plaintiffs are different. I understand
11 that. That's their job, and they're doing that.

12 THE COURT: That's the process.

13 MR. GRAVINO: Again, it gets back to this -- sort of my
14 position that it seems -- in this case that I cited, Judge, I
15 think it's representative of these balancing ones. The court's
16 kind of take a so what approach and say okay. Even if you were
17 to get that, does that really gut the essence of the claim, and,
18 if it doesn't, the courts I think prudently say this thing goes
19 forward as a class. You can't let individual variances --

20 THE COURT: But the case you said is on class cert
21 issue, I haven't even gotten there. I'm at the discovery. I'm
22 the hair on the tail of the dog.

23 MR. GRAVINO: I understand, Judge.

24 THE COURT: I'm not the dog or the tail.

25 MR. GRAVINO: But it goes to the relevance issue

1 because this opinion suggests and others that cite this say even
2 if they show that -- so, we'll give them all their due and say
3 they'll go out and find this -- and we'll agree for the sake of
4 argument. They're going to find somebody who was happy with
5 this.

6 THE COURT: So, as a matter of law, it cuts off all
7 opportunities to do the discovery?

8 MR. GRAVINO: Not all. Just the broader inquiry that
9 they're doing on these particular issues the way our claim is
10 framed.

11 THE COURT: Well, I didn't read the case. It wasn't in
12 the brief. So, I didn't read it. So, but that seems like --

13 MR. SAMORE: And I apologize for that.

14 THE COURT: It seems like a pretty Draconian process.
15 It doesn't seem to allow the defendants to defend.

16 Everybody's going to get an opportunity. And, you
17 know, everybody knows my rule on the fishing expedition. Meyers
18 v. Prudential Insurance Company. Much of discovery is a fishing
19 expedition of sorts, but the Federal Rules of Civil Procedure
20 allow the courts to determine the pond, the type of lure, and
21 how long the parties can leave their lines in the water. That's
22 my job.

23 So, anything else from the plaintiffs before I hear
24 from the defendant?

25 MR. BRUCE: To the extent that you -- I mean, it sounds

1 like we're having a healthy discourse about this with both sides
2 and all that. Judge, to the extent that you would rule that
3 some of these things should be subject to discovery, if we're
4 going to keep to the phase one, Judge, I really -- I mean,
5 there's a couple areas that I really think -- I just -- I mean,
6 the way I'm approaching -- I'll leave you with this thought.

7 First of all, on the revenues one, I just invite you
8 and everyone to look at the law on that because what they're
9 saying, they're contorting what I'm claiming in damages. If you
10 look at what I'm claiming and then all of the arguments that
11 they make and throughout their briefs on the revenues, there is
12 just nothing to suggest that they're entitled to that in the
13 case law. We are not claiming lost revenue period. And the
14 element of damages I'm claiming under that UCC provision does
15 not look at revenues. It doesn't. And so, I just -- that I
16 feel quite adamant about.

17 The second thing is, Judge, I mean, patient records,
18 HIPAA patient records, I mean, that -- I mean, maybe it's our --
19 maybe I dropped the ball and I should have given the affidavit
20 or, you know, whatever. We can supplement the record. I mean,
21 depending upon which of these areas or categories that you say
22 okay is discoverable places -- if you're even saying they're
23 relevant, you know, place a tremendous burden on these
24 plaintiffs who have active practices and all of that in terms of
25 coming up with --

1 THE COURT: Litigation is burdensome.

2 MR. BRUCE: Okay. I mean, I just -- yeah, but to what
3 end? I mean, that's the crux of my motion, and I'll shut up
4 now. To what end? If you take each one of these isolated
5 things, they're just throwing everything up there saying, gosh,
6 it's all individualized.

7 But this is a very odd case. I've been practicing law
8 for 25 years. I never had just an absolute that somebody'd come
9 in and say we lied. I've never had that in my life. This is an
10 absolute lie, and I've never had that. This is unique. And as
11 you said, Judge, these are very fact-specific cases. I've never
12 had a -- I did not expect when we got all these FDA documents
13 dumped on us right before our last hearing, I didn't expect
14 sitting home Saturday night reading these things to find out the
15 sentence where they say it doesn't remove tattoos. I didn't
16 expect that.

17 And I'm not being facetious or whatever. This is a
18 unique case. They can't deal with these facts. And so, you're
19 saying, Devon, why are you asking me to limit discovery.
20 Because of the unique facts that are here. They've admitted
21 under oath these are all photo-shopped, and they never existed.
22 So, what does it matter if, you know, some customer is satisfied
23 out in Delaware. That's not the case that I'm presenting. I'm
24 saying that they were told and they represented clearly,
25 undisputably the car went a hundred miles an hour. Now they've

1 said, based upon what we've learned so far in discovery, the car
2 doesn't go a hundred miles an hour. Period. Now they want to
3 say, well, Devon's talking about efficacy and satisfaction and
4 whether people were happy. I'm not talking -- that's not the
5 allegation in the complaint, Judge, and they've admitted this.

6 THE COURT: So, you just want your money back, the
7 \$275,000 for each machine?

8 MR. BRUCE: The UCC is very specific about the value,
9 and we can get into that. I mean, that wasn't the crux of this.
10 My crux of my motion is is that the revenue damages -- or that
11 we're not claiming consequential damages. We're not claiming
12 rescission. I mean, they keep saying, well, Devon's claiming
13 this, and then I go in the brief and I say I'm not claiming
14 that. Okay? So, then the last one was --

15 THE COURT: So, that's why I am asking you. Do you
16 want -- does each plaintiff --

17 MR. BRUCE: Okay. So, it's the UCC --

18 THE COURT: Hold on. Let me ask a question. Does each
19 plaintiff just want the \$275,000 back?

20 MR. BRUCE: Yes.

21 THE COURT: Okay. That's all I needed to know.

22 Let me hear from the defendant.

23 MR. SAMORE: Okay. They've said so many things that
24 were factually erroneous that it's hard --

25 THE COURT: You can just say I disagree with them, and

1 then tell me what the importance of it is.

2 MR. SAMORE: Just among other things, their own doctor,
3 after she had bought the product and used it for several months,
4 said PicoSure truly is the most advanced system available for
5 tattoo removal. We're clearing most tattoos in fewer treatments
6 without causing harm to the skin, and results are like nothing
7 I've ever seen. That was something she said. That was not from
8 an internal website that was used for customers. That's what
9 the plaintiff said.

10 We absolutely made no admission to the FDA. What the
11 statement to the FDA said was something like unfortunately, not
12 all tattoos can be completely removed. That is a true -- that's
13 not inconsistent with what we represented in our brochures and
14 in our statements and on our website that was available to the
15 public. It's totally consistent. There's absolutely no
16 inconsistency.

17 The photographs he mentions, not only is there no
18 testimony on it, that two of the three photographs aren't
19 even -- there are no allegations. It's not attached to his
20 complaint.

21 And I'm a little bit -- I'm sorry for being a little
22 bit worked up, but he said so many factually erroneous mistakes
23 I think that --

24 THE COURT: I've heard a great closing argument for
25 eight people from the Western Division to hear. All right? And

1 if that's the way the case goes, that's fine. That's great.
2 And that's a good thing. We should have more trials. So, focus
3 on the discovery component.

4 MR. SAMORE: This is not a summary judgment case. This
5 is not -- they've presented no evidence. Their understanding is
6 relevant to the merits. It's relevant to whether there was
7 reliance and actual deception. All of the records that we
8 request are relevant and --

9 THE COURT: Well, can you address Mr. -- the
10 plaintiffs' point is look. If all they're saying is we only
11 want our money back, nothing else, how is damages and
12 consequential damages and those types of things, why would it be
13 relevant. If all they're saying is you made a representation
14 that it would, quote, remove, meaning eliminate, it doesn't, we
15 want our money back, their point is that none of this is
16 relevant. Address that.

17 MR. SAMORE: Whether they're entitled to this -- they
18 first have to establish liability and whether --

19 THE COURT: No, no, no, no, no.

20 MR. SAMORE: Okay.

21 THE COURT: Very specific question. Their argument is
22 straightforward. All they want is their money back. They want
23 their \$275,000 back. That's the only thing they want in the
24 case. That's their damages for each plaintiff. They want the
25 purchase price back. Therefore, their argument goes, all these

1 issues relating to damages aren't relevant either for purposes
2 of class cert, individualized component, or to the merits. So,
3 address that.

4 MR. SAMORE: Okay. In reading the brief, I thought
5 they were very clear that they wanted the difference between the
6 value as represented and the value that was given. That's what
7 their brief said. They're saying something different today.

8 THE COURT: Please answer my question.

9 MR. SAMORE: Okay. And I'll --

10 MR. BALFOUR: Judge, a couple of things. One is that
11 the plaintiffs aren't entitled to get their money back. They
12 are -- if they were to get all of their money back, the only way
13 to do that would be through a rescission and restitution claim
14 and not through a UCC warranty claim. If they want to be able
15 to make that sort of claim, they need to show, A, that they did
16 not revoke their acceptance or, B, that they were -- there
17 was -- well, they need to show that they did not revoke their
18 acceptance.

19 Beyond that, plaintiff in their most recent brief said
20 they just want their damages under the UCC. Damages under the
21 UCC aren't their money back. It's the difference -- for a
22 breach of warranty, it's the difference between the amount they
23 paid and the fair market value. They've given us zero
24 inclination of how they intend to establish fair market value
25 without showing if they were going to sell this on the open

1 market, a buyer would ask what their revenues were. That would
2 determine how much they could get on the open market.
3 Therefore, the revenues are relevant to the market value of the
4 product.

5 THE COURT: Okay. So, if the difference -- if the real
6 damages under the UCC are the difference in what you paid and
7 what it's worth, why aren't damages or all these things about
8 customer satisfaction relevant?

9 MR. GRAVINO: Judge, my response to that is we intend
10 to show that, you know, what is it worth is almost a
11 mathematical comparison to a predecessor, you know, tattoo
12 lightening machine that lightens but does not remove tattoos.
13 That happens to be their predecessor machine that we also
14 bought, the RevLite. I don't have the number offhand, but
15 \$50,000. We would have paid 50 if you told the truth and said
16 this does a marginally better job of lightening, but it's a
17 great machine.

18 So, it's really a mathematical mechanical calculation.
19 It's not how did you feel about your experience. Well, we're
20 going to give that a \$10 value. I mean, that's -- we'll never
21 get to a number with that. We framed our claim as the
22 difference between what a commercially -- you know, on the
23 commercial market what a tattoo lightening machine is worth
24 versus the 275 we paid. It's a mathematical formula. That
25 evidence doesn't go to that calculation. We purposely framed it

1 that way to --

2 THE COURT: Okay. All right. So, I got that. Go
3 ahead.

4 MR. BALFOUR: Judge, that's absolutely wrong. If the
5 machine were identical to the previous machine, perhaps the
6 market value of the previous machine would be the only relevant
7 information. As it is, the market value of the previous machine
8 is a piece of relevant information, but there are other pieces
9 of relevant information, such as if this machine allows them to
10 generate more revenues than the previous machine did, it would
11 thereby be worth more.

12 Separately, putting aside the damages, revenues are
13 also relevant to whether their claims are even true. If the
14 plaintiffs have continued using the machine and continued making
15 money from the machine, despite claiming that it doesn't work --

16 THE COURT: How does that go to the class cert issue?
17 How does that go to the class cert issue?

18 MR. BALFOUR: If these plaintiffs did not -- these
19 plaintiffs claim in paragraph 55 of their complaint -- and this
20 is the crux of their entire complaint. After plaintiff
21 purchased the PicoSure product, it administered the treatment as
22 directed to numerous patients. None of the patients' tattoos
23 were removed or eliminated, contrary to Cynosure's
24 representations and promises. They provided no evidence that
25 that statement is true, and if they're lying in their brief,

1 they're not adequate or typical class representatives.

2 MR. SAMORE: I mean, what we hear from the plaintiff is
3 they go back and forth. First in their answers to
4 interrogatories they say they just want their money back.
5 That's what they said in answer to interrogatory number 16. And
6 in their brief they say they want UCC damages, which is the
7 difference in value between what was represented and what they
8 actually purchased. Now we hear -- and they've vacillated
9 several different versions today of what they're seeking in
10 terms of damages.

11 All we're seeking is for the court not to rule for
12 summary judgment in favor of the plaintiff and to allow this
13 discovery to go forward, which is directly relevant to the class
14 certification issues and whether, you know, the issue of damages
15 can be decided on a classwide basis.

16 THE COURT: Well, just because damages are different
17 for various class members, that alone isn't a basis to deny
18 class cert, right? We know that. That's at one easy end of the
19 spectrum. The other easy end of the spectrum is if they're
20 totally different, that individual -- the individualized
21 component isn't met.

22 MR. SAMORE: I mean, if they're willing to bifurcate --

23 THE COURT: Don't most cases fall between the two?

24 MR. SAMORE: If they're willing to bifurcate damages
25 and saying that they want a determination on class certification

1 with respect to liability only, then damages are not -- I
2 believe the issue is a little more -- is nuanced, and the court
3 has discretion on class certification. Whether to consider the
4 individualized inquiry of damages should preclude, I think the
5 district court has broad discretion. But I agree with what --

6 THE COURT: I mean, it's one of the factors under
7 Rule 23 that the court is required to consider, and, you know,
8 no one particular component is dispositive.

9 MR. SAMORE: Exactly.

10 THE COURT: All right. Anything else?

11 MR. SAMORE: No, your Honor. Thank you.

12 MR. BRUCE: Judge, just one final point. I don't want
13 to be -- I don't want anybody, either the defense or the judge,
14 the court, to walk away from this saying we're vacillating on
15 what we're asking for. I can't make it more clear. In our
16 plaintiffs' motion, response to their motion to compel, because
17 they raised this issue of revenue, I very clearly, emphatically
18 stated what we are claiming, and I have never vacillated from
19 that in this case. It's UCC Section 2-714 subsection two. I
20 don't need -- I mean, the law is the law.

21 You asked me if we want our money back. Yeah, we want
22 our money back. They get a -- they don't get -- we don't get
23 the full value back, your Honor, and we follow the UCC 714
24 subsection two, which says -- it's called the fair market value
25 of the goods. That's what we want back. And, you know, if

1 there was any confusion on that by the defense, I'm being very
2 clear here.

3 And then the UCC gets into more specifics. It's the
4 difference between the value of the goods accepted and the value
5 they would have had if they had been as warranted. That's the
6 claim that we're making. I thought it was clear, and if it's
7 not -- and, Judge, again, you asked the very specific question,
8 and you didn't get, respectfully, a response, a substantive
9 response. You asked the question what does -- knowing that
10 that's what we're claiming, what does the revenues have to do
11 with anything, and counsel suggested, oh, that's a factor
12 that -- that's not in any case that they've cited, Judge. They
13 haven't cited a case to you that says when you're claiming this
14 breach of damages, you get into the revenues of the product.
15 Full stop, end of story. Thank you, your Honor.

16 MR. GRAVINO: Judge, I just had one other practical
17 observation I was going to make, picking up on your question
18 about the insurance coverage, if I may. I don't mean to belabor
19 this. Counsel indicated that the defense is under reservation
20 of rights in this case. Thinking back on some cases that I've
21 handled in that vein, both as defense counsel and coverage
22 counsel, looking at this claim, there's probably a reservation
23 because there's a fraud claim, and there are other claims that
24 don't sound in fraud. That might create an opportunity at the
25 appropriate time for a settlement conference because the

1 company's interests might diverge from the insurance carrier's
2 in terms of the case with that coverage conflict. And we've had
3 other cases where a defendant insured comes to a settlement
4 conference with a corporate counsel who's looking out for the --
5 and I'm not suggesting defense counsel is not doing that, but if
6 defense counsel was hired by the insurance carrier, that
7 coverage conflict sometimes sets up an opportunity to create a
8 climate where parties might otherwise consider an early
9 resolution where they might not have if there was no coverage
10 conflict. I just point that out. I was not aware until this
11 morning that there was a reservation of rights defense. So, for
12 what that's worth, again, we certainly would entertain a
13 settlement conference at the appropriate time if there was any
14 interest.

15 MR. SAMORE: And I can tell you absolutely the company
16 has no interest in settling this. They stand by their
17 representations that were made. They are, quite frankly, pretty
18 outraged at the allegations that are made and the misstatements
19 that have been made, and they do not have an interest. I've
20 spoken with the general counsel, and he is fully apprised of the
21 case from start to finish. So, at this point in time, I can say
22 there is not an interest in settling this case.

23 And I will say at the beginning when this first lawsuit
24 was first filed, I approached plaintiffs' counsel about settling
25 on an individual basis. We made a generous offer. It was

1 rejected. And now we're here.

2 MR. BRUCE: There wasn't an offer made.

3 THE COURT: Well, why would they be willing to settle
4 before, but not now?

5 MR. SAMORE: What's that?

6 MR. BRUCE: There wasn't an offer --

7 MR. SAMORE: On an individual. There was one plaintiff
8 at the time, and then they amended the complaint. They added
9 additional plaintiffs.

10 THE COURT: So, how does that change things other
11 than --

12 MR. SAMORE: And if the plaintiff --

13 THE COURT: Don't interrupt me. How does that change
14 things other than that the dollar goes up?

15 MR. SAMORE: If the -- because the problem is they're
16 defending their product. They stand by this product. This was
17 a significant breakthrough in technology. It has, you know,
18 authoritative --

19 THE COURT: I got it. I got it. Here's my problem.
20 Here's my problem. You can't say this is about principle, never
21 going to settle it, and then say, yeah, but we'll settle with
22 part of it. It's like being pregnant. You either are or you
23 aren't.

24 And so -- and look. If you want to litigate this thing
25 to the end, I'm fine with that, and if they want to litigate it

1 to the end, I'm fine with that. If you want a settlement
2 conference, I'll make myself available.

3 MR. SAMORE: And thank you.

4 THE COURT: But -- and that's okay. And no one gets
5 dinged for not having a settlement conference at all. I've said
6 that I think twice already today. There should be more trials.
7 I'll say it a third time, if I haven't. There should be more
8 trials.

9 I'll take everything under advisement. We'll get you
10 something. Okay?

11 MR. BALFOUR: Thank you, your Honor.

12 MR. SAMORE: Thank you.

13 MR. BRUCE: Much appreciate it.

14 THE COURT: Have a good day.

15 MR. BRUCE: And, Judge, we're just -- pursuant to -- we
16 had this discussion at the end. We're kind of holding off on
17 dep schedule because that was what you --

18 THE COURT: We'll get something to you. We'll get
19 something to you soon.

20 Let's just roll right into the criminal call. We've
21 had counsel sitting around way too long.

22 (Which were all the proceedings had in the above-entitled
23 cause on the day and date aforesaid.)

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1 I certify that the foregoing was transcribed from digital
2 recording to the best of my ability.

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4 /s/ Mary T. Lindbloom

5 Official Court Reporter

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